No. 14,552

IN THE

United States Court of Appeals

For the Ninth Circuit

BLAIR HOLDINGS CORPORATION, a Corporation; BLAIR-ROLLINS & Co., INCORPORATED, a Corporation and BLAIR & Co., INC., OF NEW YORK, a Corporation,

Appellants,

vs.

BAY CITY BANK AND TRUST COMPANY, a Corporation,

Appellee.

Appeal from the United States District Court, Northern District of California, Southern Division.

APPELLEE'S REPLY BRIEF.

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Subject Index

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STATEMENT OF FACTS.

Appellants' opening brief, although filed earlier, was through inadvertence not served upon the Appellee until August 15, 1955. This brief was prepared, served and filed within thirty-five days of receipt of service of the Appellants' opening brief.

The Appellee herein has no objection to interpose as to pages one through seven of the opening brief

of Appellants since it involves simply the reproduction of a certain letter and stipulation. However, the Appellee does seriously contest the factual statement, specification of errors, and argument contained in pages eight through twenty-two of Appellants' opening brief.

The ultimate facts established in the record of this action are that Dean Witter & Co., a stock brokerage firm, interpleaded 2,000 shares of Blair stock into the Court below as a result of a dispute concerning the ownership of said stock involving Blair Holdings Corporation and Virgil D. Dardi on the one hand, and Bay City Bank & Trust Company and Phillip Barnett on the other hand.

The issues presented to the lower Court are well summarized by the pleadings submitted by the parties.

These issues are summarized as follows:

(1) Bay City Bank and Phillip Barnett contend (and the lower Court so found) that they are entitled to the 1600 shares of stock since legal title to said stock was in the name of the bank;

(2) E. J. Crofoot claimed no interest whatsoever in the stock;

(3) Blair claimed they ought to get the stock because it was either awarded to them in a judgment or award of an arbitrator, or because they had levied a writ of execution on E. J. Crofoot at Dean Witter & Co.

The evidence developed the following facts conclusively. That only 1600 shares of stock herein were in

dispute, it being admitted by Appellee that the other 400 shares of said stock belong to Virgil D. Dardi. As to the 1600 shares of Blair Holding Stock, the title to same was traced from the beginning.

On September 16, 1948, the Bay City Bank & Trust Company loaned E. J. Crofoot and the Tuckerman-Rice Milling Company $35,000.00, evidenced by a promissory note, which is Defendant's E in evidence. This note was secured by a pledge of 20,000 shares of Blair Holdings Corporation stock, at that time standing in the name of E. J. Crofoot. The note provided that in the event of a default, the bank had the right to sell said stock and in addition to the payment of the principal and interest then due, to pay attorney fees equal to 10% of the principal and interest then due on the note and other costs, and to apply any proceeds over and above said amounts to any other indebtedness owed by the makers of the note to the bank. (See Dfts. E.)

In the latter part of 1948, Crofoot and the Tuckerman-Rice Mill were unable to pay said loan and the Bay City Bank & Trust Company retained Phillip Barnett to secure the transfer of the pledged stock, to cause same to be sold, and thereby liquidate said loan. Pursuant to the terms and conditions of the note, and the retainer agreement between the Bank and Phillip Barnett, 10% of the said stock was to apply towards the cost of sale of said stock, attorneys fees incurred in causing the same to be transferred from the name of E. J. Crofoot to the name of Bay City Bank & Trust Co. (See Tr. of Record pp. 90-94.)

Phillip Barnett presented said stock to Blair Holdings Corp. for transfer and they refused to transfer same. He thereupon instituted a suit and on February 8, 1949, secured an order of the Superior Court of the State of California, In and For the City and County of San Francisco, in Action No. 383,427, ordering Blair Holdings Corporation to transfer the said 20,000 shares of stock to such party nominated by the Bay City Bank & Trust Company, upon the posting of a $50,000.00 bond. (See Dfts. Ex. 7-B.) The said $50,000 bond was posted. (Plts. 8-B.)

On March 5, 1949, Blair Holdings Corporation transferred the said 20,000 shares of stock from the name of E. J. Crofoot to the name of Bay City Bank & Trust Company and issued their invoice under said date of March 5, 1949, evidencing this transfer. (See Dfts. Ex. A.)

At the time the certificates were pledged to the Bank by Crofoot, they bore Blair Holding Corporation Certificate Nos. NHS 433, NHS 434, NHS 435 and NHS 436, each certificate being in the amount of 5,000 shares and standing in the name of E. J. Crofoot.

On March 5, 1949, those certificates were surrendered and the Blair Holdings Corporation, pursuant to Court order, issued four new certificates in the name of Bay City Bank & Trust Company, in the amount of 5,000 shares each being certificates No. SHF 2805, SHF 2806, SHF 2807, SHF 2808. (Dfts. Ex. A; Tr. of Record pp. 51-53.) The transfer was made to liquidate the loan including Court costs and attorney fees.

Defendants' Exhibit G demonstrates that prior to March 11, 1949, Phillip Barnett had received the four certificates of 5,000 shares each which had been transferred by Blair Holdings Corporation to Bay City Bank & Trust Company. That he had on March 11, 1949, transmitted Certificates 2806, 2807 and 2808 to Dean Witter & Co. with instructions to sell on his order and to deposit the proceeds in the Wells Fargo Bank to the credit of the Bay City Bank & Trust Company, and that powers of attorney to transfer would be forwarded by Bay City Bank shortly. The letter also referred to the fact that Certificate 2805 in the amount of 5,000 shares, standing in the name of Bay City Bank & Trust Company had been previously transmitted to Dean Witter & Co. on March 9, 1949, with the same instructions.

The evidence and the documentary exhibits (Dfts. 7-B, 8-B, A, F and G) conclusively establish the fact that on March 5, 1949, the 20,000 shares of stock which had previously stood in the name of E. J. Crofoot was transferred by Blair Holdings Corporation to the Bay City Bank & Trust Company and that title to said stock remained in the name of Bay City Bank & Trust Company subject to the order of Phillip Barnett, with the proceeds thereof to be deposited with the Wells Fargo Bank & Trust Company for the order of Bay City Bank & Trust Company.

The customer ledger sheet of Dean Witter & Co., account No. 5000-2256—1-32, demonstrates that from March 10, 1949, through March 16, 1949, all but 1600 shares of the Bay City Bank stock was sold by Dean

Witter & Co. upon the order of Phillip Barnett, and that said stock was carried in the name of Bay City Bank and for the account of Bay City Bank at Dean Witter & Co. (Tr. of Record pp. 55-59.)

The evidence demonstrates that the mechanics for the sale of the 20,000 shares of stock placed in Bay City Bank's name were that the stock was put into Dean Witter & Co. for sale upon the order of Phillip Barnett as to the time to effect sales and the amount of stock to be sold. That stock powers and resolutions authorizing the endorsement of the stock sold were sent to the Wells Fargo Bank & Trust Company by the Bay City Bank and that the Wells Fargo Bank did endorse the stock sold, based upon said stock powers and resolutions. (Dfts. Ex. A.) That when Dean Witter received the funds from the sale of said stock, that company did turn the proceeds over to Wells Fargo Bank, who in turn delivered them to Bay City Bank. The record further demonstrates that in the sale of the stock from March 10, 1949, through March 16, 1949, that the market price on said stock was depressed from a high of $2.25 a share to a low of $1.50 a share. (Tr. of Record p. 99.) Mr. Barnett testified that the reduction in the sales price, as well as the general atmosphere existing at that time caused him to withhold further order for the sale of the 1600 shares remaining.

Approximately one year later the principal parties to the litigation (which by that time had grown to some six (6) lawsuits) had determined to refer the matter to an arbitrator. This arbitration took place

during the period March 26, 1950, until about June 1, 1950. In this period a $1,000.00 premium fell due on the indemnity bond posted as a result of Judge Sapiro's order. (Dfts. Ex. 7-B and 8-B.) In order to avoid the payment of this $1,000.00 premium and due to the fact that nearly all of the 20,000 shares of stock had previously been sold in liquidation of the debt due to the Bay City Bank and Trust Company (which was admittedly a bona fide purchaser for value), it was determined by Blair Holdings Corporation that 2,000 shares of Blair stock could be held in lieu of the $50,000 bond. Since Bay City Bank & Trust Company only had 1600 shares of stock remaining with Dean Witter & Co., and since that stock was earmarked for counsel fees and costs and since the Bank did not wish to become further involved, Mr. Virgil Dardi, the then president of Blair Holdings Corporation, loaned 400 shares of stock, and the same was escrowed pursuant to the letter of May 26, 1950, being Defendant's 1-B in evidence. (See Tr. of Record pp. 102-104.)

Upon the termination of the proceedings, the shares of stock thus escrowed were to be subject to either the order of the arbitrator, or the joint order of the parties. The said stock was to be substituted in lieu of the $50,000 indemnity bond and would be turned over to Blair & Co. only if the arbitrator found that the Bay City Bank stock had *not been converted,* and only to the extent of any damages that Blair might have suffered by virtue of having been ordered to transfer the stock to Bay City Bank & Trust Company.

The arbitrator did not make any award concerning said stock, nor was any order or judgment of the Court made concerning same. (Dfts. Ex. 9-B, 10-B and 11-B.)

The arbitrator and the Court did find that the Bay City Bank & Trust Company stock had been converted by Blair Holdings Corporation, and such order and judgment of conversion obviously terminated the necessity of any further bond being posted. The finding of conversion of the Bay City Bank stock by Blair Holdings Corporation thus terminated any further requirement of the posting of undertaking of bond and the 400 shares of stock should have been returned to Virgil Dardi and the 1600 shares to the Bay City Bank. While Virgil Dardi requested that this be done (Tr. of Record p. 104), counsel for the corporation refused to do so.

At no time were the 1600 shares of stock (in the name of and held for the account of Bay City Bank & Trust Company) ever transferred by that Bank to Blair Holdings Corporation. At no time did any of the parties intend to effect a transfer of title to the 1600 shares of stock from Bay City Bank & Trust Company's account to any other person or company. The said 1600 shares of stock were allowed to remain in Dean Witter & Co., in the account of Bay City Bank & Trust Company, in lieu of a bond, in the spirit of assisting or attempting to effect a compromise and for the joint purpose of preventing an unnecessary expenditure of an additional $1,000.00 premium on bond.

After March 11, 1949, when the 20,000 shares of stock standing in the name of Bay City Bank & Trust Company were deposited with Dean Witter for sale, the Wells Fargo Bank (who had stock powers and resolutions to endorse said certificates to the purchaser) caused the stock to be placed in "street name" to facilitate the sale and to expedite the transfers of said shares of stock by Dean Witter to the various purchasers. Defendant's Exhibit C, the Ledger Sheet for Bay City Bank & Trust Company, demonstrates that numerous sales were made and it was to facilitate and expedite transfers to these purchasers that Wells Fargo Bank caused the stock to be placed in "street name" and to be held in "street name" in the account of and for the account of Bay City Bank & Trust Company.

It is significant that at no time was the 1600 shares of stock ever taken out of the account of Bay City Bank or ever transferred by Bay City Bank to Blair Holdings Corporation, or any other person. (See Tr. of Record pp. 106-109.) It is submitted that the conclusive evidence established by Defendants' Exhibits 7-B and 8-B and Defendants' Exhibits A, F and G show that the lower Court's finding No. 8 and finding No. 10 are fully and completely supported by that evidence and that the title to said 20,000 shares of stock and the remaining 1600 shares of that block of stock at all times was and is the property of Bay City Bank & Trust Company.

ARGUMENT.

The sole issue raised in the brief of Appellants is that Bay City Bank & Trust Company never had title to the 1600 shares of stock on deposit with Dean Witter & Co. and, therefore, the finding of the Court to this effect is erroneous and, therefore, by virtue of Blair Holdings Corporation's writs of execution, they should be entitled to the stock.

Appellants contend that finding No. 8 is not supported by the evidence and assume something not in evidence in providing that Bay City Bank & Trust Company had title to the stock. (Appellants' Brief p. 22.) Defendants' Exhibits 7-B, 8-B, A, F and G all conclusively demonstrate that the title to the 20,000 shares of stock was transferred by Blair Holdings Corporation to the Bay City Bank & Trust Company on March 5, 1949. That the stock was then placed with Dean Witter & Co. for sale by the attorney of Bay City Bank & Trust Company, Phillip Barnett, and that ever since placing said stock with Dean Witter and to the present time, title to said stock remains vested in the Bay City Bank & Trust Company, subject to the order of Phillip Barnett. That the said 1600 shares of stock, remaining on deposit with Dean Witter, was a part and parcel of the 20,000 shares originally deposited there. Thus, Bay City Bank & Trust Company traced its title from March 5, 1949, down to the date of the trial, and the Court properly confirmed title of that stock in Bay City Bank & Trust Company, and awarded the said 1600 shares to Bay City Bank & Trust Company.

At page 20 of Appellants' Brief, it is stated that the levy of Blair has reached the interest of Crofoot (in said stock) which was never divested. Here again Appellants completely overlook the conclusive evidence that title of the 20,000 shares was divested from Crofoot and vested in Bay City Bank on March 5, 1949.

At pages 13-16 of the Appellants' Brief, a tenuous argument is made that while Bay City Bank might have been entitled to sell the stock and to pay off their loan and interest, together with attorney fees, the amount of the attorney fees represented by 1600 shares of stock is excessive and that, therefore, should not have been confirmed by the Court. It is argued that the fact that Blair blocked the transfer of stock, requiring Bay City to obtain counsel and to file suit to enforce the transfer, was no fault of Crofoot, therefore Crofoot should not be required to shoulder the burden of the Bank's attorney fees. However, earlier in their brief, they point out that Blair blocked the transfer of stock due to alleged fraud of Crofoot, forcing Bay City Bank to incur attorney fees and costs to effect the transfer of the stock.

In any event, the argument made involves simply a question of fact which was resolved in favor of Bay City Bank & Trust Company and against Blair Holdings Corporation by the lower Court, and is not an issue to be considered on appeal.

At pages 10, 11 and 15 of the Appellants' Brief, a theory is urged that Bay City Bank & Trust Company had simply a lien on the stock and that title

of the stock remained in Crofoot. This obviously disregards the order of Judge Sapiro under date of February 8, 1949, ordering that stock transferred to the Bay City Bank & Trust Company and completely disregards Defendants' Exhibits A, F and G, which conclusively demonstrates that the stock was transferred by Blair to Bay City Bank and that legal title to the stock thereafter remained in Bay City Bank in payment of the debt due plus attorney fees and costs incurred.

LEGAL AUTHORITIES CITED BY APPELLANTS.

The sum and substance of the legal authorities cited by Appellants is to the effect that a judgment creditor has a right to execute upon any equity that a pledgor might have in his pledged property, subject to the right of the pledgee to first satisfy his obligation out of said pledged property. With this proposition of law, the Appellee is in full agreement. However, it is fully inapplicable to the situation at bar for the simple reason that the pledgor-pledgee relationship between E. J. Crofoot and the Bay City Bank & Trust Company ceased to exist early in 1949, when E. J. Crofoot surrendered his stock in satisfaction of the obligations owing to the Bank, including the obligation for attorney fees and court costs incurred by the Bank in reducing the pledged stock to cash. Thus, there was no pledged relationship existing some five years later, in September, 1954, which was the time that Blair Holdings Corporation levied its execution as a judgment debtor. Therefore, of course, the

law cited by the Appellants is fully inapplicable in this case.

In summary, the Bay City Bank & Trust Company accepted from E. J. Crofoot the 20,000 shares of Blair stock in full payment and satisfaction of the debt owing by Crofoot to the Bank, including the costs and attorney fees incurred by the Bank in reducing the pledged property to cash. Thus, the Bank became the owner of said stock in a bona fide transfer for value five years and six months prior to the levy of the writ of execution by Blair as a judgment creditor.

The case of *San Angelo Hilton Hotel Company v. B. B. Hail Building Corporation,* 60 S.W. (2d) 1049, cited by appellant, simply holds that a landlord who is suing for rent due to him for the leasing of a hotel and to foreclose a chattel mortgage is entitled to request the appointment of a receiver for the corporate tenant of that hotel notwithstanding the fact that that landlord has assigned the rentals due from his lessee as a pledge to secure a mortgage debt. The Hail Building Corporation had built a hotel for the San Angelo Company and leased it to them for fifty years at a monthly rental of $6,166.00 and took in pledge as security for the payment of the rent the hotel fixtures and furniture placed on the premises by the lessee. The lessee company became so greatly in debt and financially insolvent that the B. B. Hail Company sought the appointment of a receiver. In the meantime, however, the Hail Company had assigned the rents and revenues arising from this lease to third parties to

secure indebtedness which the B. B. Hail Company owed said third parties. The San Angelo Hotel Company, lessee, claimed that the Court should not have entertained the Hail Company's petition for receivership on the grounds that the Hail Company had assigned their interest in the rents and, therefore, was not a real party in interest. The Court held that they had not fully assigned their interest in the rents to third parties, but had merely given the third parties the right to collect the rents from the San Angelo Hotel Company in the event the B. B. Hail Company failed to pay its obligation to the third parties.

Obviously, this case is wholly not in point and has absolutely no substantive value as involves the issues in the case at bar.

The case of *Cross v. Eureka Lake Canal Company,* 73 C. 302, a case decided in 1887, is again not in point, the reason being that in the *Cross* case the suit was by the pledgor of certain stock against the pledgee, thus a suit involving the two parties to the pledge relationship. It did not involve an adverse claim by a creditor of the pledgor against the pledged property which was held by the pledgee. It is therefore not in point. In the *Cross* case, Mr. Zellerbach had borrowed $50,000 from Mr. Sigourney and gave 1950 shares of stock into the hands of a Mr. Parrott to secure the indebtedness. Mr. Parrott was Mr. Sigourney's agent and turned the stock over to Mr. Sigourney. Thus, in effect, Zellerbach pledged 1950 shares of stock with Sigourney to secure a $50,000 indebtedness. Upon Sigourney's death, his

administrator filed a suit upon the two notes, a judgment was entered and the Court ordered 1250 shares of the stock sold to satisfy the notes and all costs of action and expense of sale, thus leaving 750 shares of stock free and clear of any charge or encumbrance.

In the *Cross* case, Mr. Zellerbach prevailed, the Court ordering that he was entitled to the return of all dividends paid upon the stock during the period they were in pledge and that the person to whom Mr. Zellerbach had sold the 750 shares of stock had a right to claim it since the pledge had been discharged by the sale of the 1250 shares of stock and the payment of the obligation.

This case is not in point for two reasons. First, it is a suit by the pledgor against the pledgee to recover the income from the pledged property which was not required to liquidate the obligation owed; and, secondly, since the income received on the stock, together with the additional 750 shares of stock (not required in liquidation of the loan) was in excess of what was required, it should be returned to the pledgor upon payment of the obligation.

In the case at bar, however, the 20,000 shares of stock pledged by Crofoot were turned over to the Bay City Bank & Trust Company in full satisfaction of Crofoot's obligation to that Bank five years and six months prior to the levy of execution and all of said stock was required to liquidate the principal obligation, the interest thereon and attorney fees and court costs incurred in securing the transfer of the stock and applying the proceeds therefrom to the in-

debtedness. Thus, in the case at bar, the pledged property was just sufficient to meet these obligations and such was the finding of the Court in awarding the property to the Bay City Bank. In the *Cross* case the property recovered by the pledgor was over and above that required to liquidate the loan, pay attorney fees and court costs.

For the reasons above assigned, the Appellants have wholly failed to sustain their assertion that the findings and judgment of the Court below were erroneous and, in fact, it has been demonstrated herein that those findings and judgment are adequately supported by the evidence and the law.

Dated, San Francisco, California,
September 13, 1955.

BARNETT & ROBERTSON,
By RODNEY H. ROBERTSON,
Attorneys for Appellee.